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Supreme Court of the United States

October Term 1942

No. 726

NATHAN MAYO AND ROY HUTCHINSON,
Appellants,

—VS.—

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF OF APPELLANTS

J. TOM WATSON,
Attorney General of Florida;

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FRED M. BURNS,
Assistant Attorneys General of Florida;

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WM. C. PIERCE,
Counsel for Appellants.

Brief adopted by the undersigned as amici curiae:

WILLIAM N. MCQUEEN, as *Acting Attorney General* in behalf of the State of Alabama;

EUGENE STANLEY, as *Attorney General* in behalf of the State of *Louisiana;*

HARRY MCMULLAN, as *Attorney General* in behalf of the State of North Carolina;

THOMAS J. HERBERT, as *Attorney General* in behalf of the State of Ohio.

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SUBJECT INDEX

	Page
I. OFFICIAL REPORT OF OPINION BELOW ..	1
II. CONCISE STATEMENT OF JURISDICTION .	1
III. STATEMENT OF THE CASE	5
(a) Progress of the case	5
(b) Analysis of pleadings and evidence .	8
(c) Conclusion	11
IV. SPECIFICATIONS OF ERRORS INTENDED TO BE URGED	13
First specification	13
Second specification	14
Third specification	14
V. SUMMARY OF ARGUMENT	14
First specification	14
Second specification	16
Third specification	17
VI. ARGUMENT	19
First specification	19
Second specification	25
Third specification	38
APPENDIX "A"—Order on Motion and Final Decree	43
APPENDIX "B"—Dissenting Opinion of Hon. Curtis L. Waller	45

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TABLE OF CASES CITED

CASES *Page*

Alabama v. King and Boozer,
314 U. S. 1, 86 L. ed. 1, 62, S. Ct. 43.....20, 40

Ashton v. Cameron County Water Imp. Co.,
298 U. S. 513, 56 S. C. R. 892, 80 L. ed. 1309... 26

Brucker v. Fisher, 49 Fed. (2d) 759..... 5

California v. Thompson,
313 U. S. 109, text 113 and 114, 61 S. C. R. 930,
85 L. ed. 1219, text 1221 and 1222..... 30

Carter v. Carter Coal Co.,
298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160....27, 31

Collector v. Day,
11 Wall. 113, 124, 20 L. ed. 122, 125..... 27

Colorado v. Symes,
286 U. S. 510, 52 S. C. R. 635, 76 L. ed. 1253.... 26

Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903..... 26

Driscoll v. Edison Light & Power Co.,
307 U. S 104, 83 L. ed. 1134, 59 S. Ct. 715.... 4

Durrant v. Bennett, 54 Fed. (2d) 634..... 5

Educational Films Corp. v. Ward,
282 U. S. 379, text 391, 392, 51 S. C. R. 170,
75 L. ed. 400, text 406, 407..... 35

Eicholz, John v. Public Service Commission of the
State of Missouri, 306 U. S. 268, 83 L. ed. 641.. 4

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U. S. 95, 86 L. ed. 65..... 37

Georgia v. Tennessee Copper Co.,
206 U. S. 230, text 237, 27 S. Ct. 618, 51 L. ed.
1038, text 1044..... 34

Graves v. New York,
306 U. S. 466, 83 L. ed. 927.....15, 20, 21, 23, 24, 25

CASES *Page*

Gulf Fisheries Co. v. Darrouzet,
17 Fed. (2d) 374, affirmed in 276 U. S. 124,
48 S. C. R. 227, 72 L. ed. 495..... 27

Harkness, J. Smylie v. Valentine K. Irion, Commissioner, 278 U. S. 92, 73 L. ed. 199..... 5

Hudson Water Co. v. McCarter,
209 U. S. 349, text 355, 28 S. C. R. 529, 14 Ann. Cas. 560, 52 L. ed. 828..... 34

James v. Drevo Contracting Co.,
302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208..... 25

Jewel Tea Co. v. Troy, 80 Fed. (2d) 366..... 27

Madden v. Kentucky,
309 U. S. 83, 60 S. C. R. 406, 125 A. L. R. 1383,
84 L. ed. 590..... 26

Mayo v. Lakeland Highlands Canning Co.,
309 U. S. 310, 84 L. ed. 774, 60 S. Ct. 516..... 5

M'Culloch v. The State of Maryland.
4 Wh. 316, 4 L. ed. 579..... 21

Ohio Life Insurance etc. Company v. Debolt,
16 How. 416, 14 L. ed. 997..... 26

Oklahoma Natural Gas Co. v. Campbell, et al,
261 U. S. 290, 67 L. ed. 659, 43 S. Ct. 353..... 5

Palmer Brothers v. Weaver,
3 Fed. (2d) 333, affirmed in 266 U. S. 588,
45 S. C. R. 128, 69 L. ed. 455..... 27

Patapsco Guano Co. v. Board of Agriculture, etc.,
171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191..15, 23, 28

Penn Dairies, Inc. etc. v. Milk Control Commission,
etc., not yet reported..... 17

Pullman Co. v. Railroad Commission of Texas,
33 Fed. Supp. 675; reversed in 312 U. S. 496,
61 S. Ct. 643, 85 L. ed. 971..... 4

CASES *Page*

Pure Oil Co. v. Minnesota,
248 U. S. 158, text 161 and 162, 39 S. C. R. 35,
63 L. ed. 180, text 188 and 189..... 27

Query v. United States,
316 U. S. 486, 62 S. Ct. 1122, 86 L. ed. 1616.. 4

Skiriotes v. Florida,
313 U. S. 69, 61 S. C. R. 924, 85 L. ed. 1193.... 26

Smith v. Wilson,
273 U. S. 388, 71 L. ed. 699, 47 S. Ct. 385.... 5

Standard Oil Co. of Louisiana v. Fortenot,
198 La. 644, 4 So. (2d) 634..... 41

Thirty-first Infantry Post Exchange v. Posadoes,
54 Philippine 866. Writ of certiorari denied.
283 U. S. 839, 75 L. ed. 1449, 51 S. Ct. 489.... 25

United States v. Butler,
297 U. S. 1, text 75, 56 S. C. R. 312, 102 A. L. R.
914, 80 L. ed. 477, text 493..... 26

United States v. California,
297 U. S. 175, text 183 and 184, 56 S. C. R. 421,
80 L. ed. 567, text 572..... 33

United States v. Mayo, 47 Fed. Supp. (Adv.) 552.. 1

FEDERAL CONSTITUTION:

Article I, Section 10.....23, 24
Article I, Section 10, clause 2.....4, 15
Article VI, clause 2..... 21

FEDERAL STATUTES:

Judicial Code of the United States Sections 238 and
266 (28 U. S. C. A. Sections 345 (3) and 380)..... 1
Public Law 674 (77th Congress), Approved July
22, 1942..... 22
16 U. S. C. Section 590g, Section 1..... 8

FLORIDA STATUTES:

Florida Statutes, 1941:
Sections 19.30 to 19.44 incl.
19.47 to 19.53 incl. 3
Chapter 576 2
Chapter 576.03 3
Chapter 576.05 3
Chapter 576.07 3
Chapter 576.11 3

MISCELLANEOUS:

Annotations A. L. R. p. 622, Vol. 140 21
Rule 56(c) Federal Rules of Practice, Civil Procedure 11
University of Chicago Law Review, Vol. 9, p. 351 .. 20

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THE UNITED STATES OF AMERICA,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

I.

OFFICIAL REPORT OF OPINION BELOW

The opinion of the District Court of the United States for the Northern District of Florida, in the case from which this appeal is taken, is reported under the title of United States vs. Mayo, et al., in 47 Fed. Supp. (Adv.) 552.

II

CONCISE STATEMENT OF JURISDICTION

Direct Appeals, when allowed.

The jurisdiction of the Supreme Court of the United States, to review the decree from which the appeal herein was taken, is conferred by sections 238 and 266 of the Judicial Code of the United States (28 U. S. C. A. sections 345 (3) and 380), which sections provide that an appeal may be taken, from the District Courts of the United States, directly to the Supreme Court of the United States from orders and decrees granting or denying interlocutory or permanent injunctions suspending

or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to such statute.

Defendants are state officers.

The appellant, Nathan Mayo, is the duly elected, qualified and commissioned Commissioner of Agriculture of the State of Florida, and the appellant, Roy Hutchinson, is a duly appointed, qualified and commissioned inspector under the Commissioner of Agriculture of the State of Florida. The said appellants were, by the decree appealed from, restrained and prohibited from enforcing the Florida Commercial Fertilizer Law (Chapter 576, Florida Statutes, 1941)and from carrying out the duties imposed upon them by said laws, insofar as it relates to fertilizer and fertilizer materials brought or shipped into the State of Florida, by or under the direction of the United States, for use upon lands within and under the jurisdiction of the State of Florida, not owned by or under the exclusive jurisdiction of the United States.

Florida Commercial Fertilizer Law.

The Florida Commercial Fertilizer Law (Chapter 576, Florida Statutes, 1941) in substance provides that every person, or his agent, engaged in the business of importing, preparing, mixing or manufacturing commercial fertilizer and fertilizer materials for sale or use in the State of Florida, either direct to the consumer or by or through other media of distribution, shall, before offering the same for sale or use in said state, register the name and guaranteed analysis of such fertilizer or fertilizer materials with the Commissioner of Agriculture

of the State of Florida (Section 576.03, Florida Statutes, 1941); notify the said Commissioner of shipments of fertilizer and fertilizer materials into this state, giving certain information acquired in connection therewith (Section 576.05, Florida Statutes, 1941); show on, or by a tag attached to, each bag or package of fertilizer or fertilizer materials sold or offered for sale or use, the guaranteed analysis thereof (Section 576.07, Florida Statutes, 1941); and pay an inspection fee, for the purpose of defraying the expense of the enforcement of the said Florida Commercial Fertilizer Law, of 25¢ per ton of fertilizer or fertilizer materials sold or offered for sale or use in the State of Florida (Section 576.11, Florida Statutes, 1941). The Commissioner of Agriculture and the inspectors under the Commissioner of Agriculture are charged with the enforcement of the said Florida Commercial Fertilizer Law and with the inspection and analysis of such fertilizer and fertilizer materials, for the purpose of ascertaining and determining whether or not they comply with the said Commercial Fertilizer Law (Sections 19.30 to 19.44, inclusive, 19.47 to 19.53, inclusive, and Chapter 576, Florida Statutes, 1941). The validity of the aforesaid Commercial Fertilizer Law is involved in this suit and it was held by the three judge Federal District Court to be inapplicable to fertilizer and fertilizer materials brought into the State of Florida, by or under the direction of the United States or its agencies, and disposed of for use on lands within the State of Florida not owned by or under the exclusive jurisdiction of the United States, because of constitutional grounds and the sovereignty of the United States.

Substantial questions involved.

The questions involved in this appeal are substantial in character, in that they involve the question of the

extent of the powers of the several states to make inspection of fertilizer and fertilizer materials brought or shipped into their borders, by or under the direction of the United States for use upon lands under the jurisdiction of such states and not owned or controlled by the United States. A determination of the questions involved in this appeal will also be a substantial determination of the question of the right of states to inspect seeds, plants, bulbs, nursery stock and similar articles brought or shipped into such states under similar circumstances. The questions involve the extent of the sovereign powers of the United States as against the powers of the states to make inspection of the materials aforesaid, that is, states' rights and police power. Also whether the power to levy inspection fees in aid of regulatory laws has been expressly reserved to the state and expressly declared to be a state right by Section 10, Article I, Clause 2 of the United States Constitution, even beyond the power of Congress to grant immunity, although it is not necessary in this particular case to go that far, inasmuch as Congress has indicated no such intention. The foregoing questions involved have not heretofore been determined by the Supreme Court of the United States.

Cases believed to sustain jurisdiction.

Query v. U. S., 316 U. S. 486, 62 S. Ct. 1122, 86 L. ed. 1616;

Frank Eicholz v. Public Service Commission of the State of Missouri, 306 U. S. 268, 83 L. ed. 641;

Driscoll v. Edison Light & Power Co., 307 U. S. 104, 83 L. ed. 1134, 59 S. Ct. 715;

Pullman Company v. Railroad Commission of Texas, 33 F. Supp. 675; reversed in 312 U. S. 496, 61 S. Ct. 643, 85 L. ed. 971;

Brucker v. Fisher, 49 F. (2d) 759;

Smith v. Wilson, 273 U. S. 388, 71 L. ed. 699, 47 S. Ct. 385;

J. Smylie Harkness v. Valentine K. Irion, Commissioner, 278 U. S. 92, 73 L. ed. 199;

Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 84 L. ed. 774, 60 S. Ct. 516;

Oklahoma Natural Gas Co. v. Campbell Russell, et al., constituting Corporation Commission of the State of Oklahoma, 261 U. S. 290, 67 L. ed. 659, 43 S. Ct. 353;

Durrant v. Bennett, 54 F. (2d) 634.

III

STATEMENT OF THE CASE

We will give the Court a brief resume of the progress of the case in the Court below, to be followed by an analysis of the pleadings and evidence, and a conclusion.

(a) Progress of the case.

The complaint was filed by appellee here as plaintiff in the Court below, in the United States District Court for the Northern District of Florida, asking for a preliminary and permanent injunction restraining Nathan Mayo, who is the Commissioner of Agriculture of the State of Florida, and Roy Hutchinson who is an inspector in the Department of Agriculture of the State of Florida.

The sworn bill was filed on September 19, 1942 (R 1) together with an affidavit of Joseph L. Orr, Acting Director, Division of Special Programs, Agricultural Adjustment Administration (R 9), with exhibits. On the same day District Judge Augustine V. Long, on the showing of alleged unconstitutional action and irreparable in-

jury, issued a temporary restraining order and required defendants to show cause before the Court on September 29, 1942, why preliminary injunction should not issue (R 47). The order of September 19, 1942 was extended by successive orders (R 49, 51, 52). On September 28, 1942 order was entered convening three judge District Court (R 50) and the hearing set for October 26, 1942.

On October 25, 1942 answer was filed by Nathan Mayo and Roy Hutchinson answering bill and setting up affirmative defenses charging the United States and its agencies with deliberately and intentionally attempting to evade enforcement of the Florida Commercial Fertilizer Law (R 62), setting out that Florida has sufficient manufacturers to furnish all Florida fertilizer (R 62), that officials of the Agricultural Adjustment Administration have refused Florida manufacturers permission to deliver to Florida farmers (R 63) and asking for affirmative relief and declaratory judgment (R 64).

On October 26, 1942 the United States filed Reply to Counter-claim and prayed that the counter-claim be dismissed and no declaratory judgment be granted except in conformity with the general prayer of the Bill of Complaint (R 74). At the same time affidavits were filed on behalf of the United States (R 75, 78, 81) to deny facts set out in defendants' Answer, and a chart showing estimated Distribution of Fertilizer by States (R 86).

The State of Florida introduced affidavits of J. J. Taylor, State Chemist of Florida (R 101, 102), V. L. Fuqua, State Chemist of Tennessee (R 103) and J. J. Woodside, Director of Seed Laboratory Division of North Carolina (R 104)) as evidence that materials shipped into states by the Agricultural Adjustment Administration were be-

low standard required by respective states and was a deliberate attempt of Agricultural Adjustment Administration to evade State Inspection Laws.

On October 26, 1942, after hearing on preliminary injunction, the parties, after the Court indicated its desire to enter permanent injunction, on motion for summary judgment by plaintiff, waived ten (10) days notice requirement of Rule 56 (c) (R 109).

The three judge District Court was convened at Tallahassee, Florida, composed of Hon. Leon McCord, United States Circuit Judge, Hon. Augustine V. Long, United States District Judge and Hon. Curtis L. Waller, United States District Judge (now Circuit Judge). On the same day Findings of Fact and Conclusions of Law was entered (R 109), which recited that the plaintiff's application for preliminary injunction was granted; and on oral motion of plaintiff for summary judgment under Rule 56(c), the ten (10) day notice requirement having been waived, the Court entered its findings of fact and conclusions of law. The Court found, among other things, that defendants, under purported authority of the Florida Commercial Fertilizer Law, were interfering with the United States in the exercise of one of its sovereign functions (R 111); and that the United States and its property were immune from the Florida Commercial Fertilizer Law (R 112). The Court further found there was no genuine issue as to any material fact and plaintiff was entitled to judgment as a matter of law (R 115) and that the property and transactions referred to in the findings of fact were beyond application of the Florida Commercial Fertilizer Law and the legal defenses set forth in defendants' answer were overruled (R 115). Hon. Curtis L. Waller dissented (R 117).

On October 26, 1942 order on motion and final decree was entered (R 116) (See Appendix "A"). Hon. Curtis L. Waller wrote a dissenting opinion (R 117) (See Appendix "B").

On January 13, 1943, defendants procured order allowing appeal from the order of the three judge Court (R 131). The assignments of errors urged as error the rulings made by the Court on the merits of the case and the propriety of disposing of the case on motion for summary judgment (R 127).

(b) Analysis of pleadings and evidence.

The sworn bill of the United States, mentioned in (a) above, alleged that the plaintiff was engaged in the distribution of fertilizer in Florida as a part of the soil conservation program of the United States under Section 1 of the Soil Conservation and Domestic Allotment Act (16 U. S. C. Section 590g) (R 2); that the defendants were interfering with and obstructing the United States in carrying out its program by issuing "stop sale notices" and threats to seize and sell the fertilizer (R 3); that the United States, its property and transactions were outside the scope of the police power of the state (R 4); that the United States entered into contract and purchased fertilizer from the Mutual Fertilizer Company, Savannah, Georgia, and shipped such fertilizer into Florida (R 6) and entered into contract and purchased fertilizer from the Georgia Fertilizer Company, Valdosta, Georgia, and shipped such fertilizer into Florida (R 6); that "stop sale notices" were issued against three lots of such fertilizer shipped in interstate commerce (R 7), and caused one shipment to be seized.

The prayer was for preliminary and permanent injunction to restrain defendants from applying the Florida

Commercial Fertilizer Law to the United States, its property, transactions or persons engaged in its behalf in carrying out its program (R 8). Attached was affidavit of Joseph L. Orr (R 9) setting out in detail the method of carrying out the government program and facts purporting to sustain the allegations of the bill. Other exhibits attached to the bill were the bids of the fertilizer companies, Exhibits 1 and 2 (R 14, 28), and acceptance of proposal of Mutual Fertilizer Company (R 27) and Georgia Fertilizer Company (R 43), which acceptance was by the Agricultural Adjustment Administration together with other exhibits.

The known defendants, Nathan Mayo and Roy Hutchinson, answered the bill setting up seven defenses attacking the sufficiency of the bill (R 53) and the eighth defense answered generally (R 56) setting up the affirmative defenses that the United States was merely acting as a conduit or agency for the transmission of Florida fertilizer, and charged the United States, and its agencies, with deliberately intending to evade enforcement of the Florida Commercial Fertilizer Law and preventing inspection of fertilizers sold in the State of Florida, and further set up that the State has ample manufacturers to furnish all Florida farmers at lower costs, and that the Agricultural Adjustment Administration refused to permit delivery by such manufacturers and that the Soil Conservation and Domestic Allotment Act provides for making payment to farmers of an amount which contemplates payment of all costs including inspection fees.

The State of Florida filed a counter-claim for declaratory relief (R 64) reaverring the affirmative defenses and set up the sections of the Florida Commercial Fertilizer Law requiring payment of the inspection fee and that

provision is made in the Soil Conservation and Domestic Allotment Act for payment of the fertilizer materials and demanding that the Court adjudge whether or not the distribution of fertilizer materials, by the United States, is free and unrestricted from the fertilizer inspection laws of the State of Florida and whether or not the manufacturer or any other person is liable for the payment of the inspection fees. Such answer was sworn to by the Commissioner of Agriculture (R 71). On October 26, 1942, the United States filed its reply to the counter-claim for declaratory relief making general denial and demanding that the counter-claim be dismissed and no relief be granted and no declaratory judgment be made except in pursuance of the general prayer of the complaint (R 72), which reply was sworn to by an official of the Agricultural Adjustment Administration. To sustain the reply to the counter-claim, affidavits were filed on behalf of the United States government, as follows: affidavit of William G. Finn, No. 1 (R 75), which affidavit, among other things, sought to justify the purchase of fertilizer for Florida farmers outside the State of Florida; affidavit of William G. Finn, No. 2 (R 78), which affidavit, among other things, sought to establish inspection of fertilizer brought into the State by the United States. The defendants produced affidavits of J. J. Taylor, V. L. Fuqua and J. J. Woodside (R 101, 102, 103), which showed facts that materials brought into the various states by the Agricultural Adjustment Administration did not comply with inspection laws of such states.

On hearing for preliminary injunction, on October 26, 1942, the Court granted the application for preliminary injunction (R 116) and, on oral motion of the plaintiff for summary judgment, expressed desire to enter permanent injunction and requested defendants to waive ten

(10) day notice in order that such permanent injunction might be granted. Stipulation was filed by the plaintiff and the defendants, waiving the ten (10) day notice rule required by Rule 56 (c) of the Federal Rules Practice, Civil Procedure (R 109). On motion for summary judgment the defendants had full benefit of their pleadings and evidence, yet in spite of the evidence and defenses that the defendants had produced, or could produce, the Court ruled there was no defense to the action brought by the plaintiff.

(c) Conclusion.

Each year the Agricultural Adjustment Administration presents to farmers a program to preserve and improve the fertility of their soil. Basically, this is an offer to make payments at prescribed rates for carrying out specified practices that are deemed, by the Agricultural Adjustment Administration, particularly important in this respect. Certain of these practices involve the application to the soil of superphosphates in connection with the planting of legumes and grasses. Instructions are issued to the farmers who participate in the program, which must be followed if the farmers are to obtain the benefits. In carrying out the program the Agricultural Adjustment Administration formulated a plan by which, superphosphates, among other products, may be obtained by the farmers in advance of performance. Subsequently when performance payment is made the value of the materials received is deducted from the total payments due. In other words, materials are supplied to farmers in lieu of payment which the farmers would otherwise receive for carrying out the practices under the conservation program.

The fertilizers are purchased by the United States with funds appropriated by Congress in the Department of

Agriculture Appropriation Act, approved July 22, 1942. These fertilizers are purchased in various states and delivered to agents of the Agricultural Adjustment Administration and by them delivered to farmers carrying out the practices provided in the Act. These materials are purchased under contract and are shipped on government bill of lading to destinations specified by the Agricultural Adjustment Administration. In the instant case the United States entered into contracts with the Mutual Fertilizer Company of Savannah, Georgia (R 14) and Georgia Fertilizer Company of Valdosta, Georgia (R 28). Pursuant to the terms and conditions of such contracts the Agricultural Adjustment Administration ordered that shipments of superphosphates, be made to various destinations in the State of Florida, including the shipments that were seized or detained under the direction of the Commissioner of Agriculture and inspectors of the Commissioner of Agriculture of the State of Florida. The Commissioner of Agriculture issued "stop sale notices" and by its terms, required that the county administrative officer of the Agricultural Conservation Association, to which one of the aforesaid shipments of superphosphate was made, withdraw from sale or delivery the contents of the car of superphosphates, and to hold the same subject to instruction from the Commissioner of Agriculture of the State of Florida because such superphosphates were not registered and tagged in accordance with the Florida Commercial Fertilizer Law and because they had not been inspected and passed by the aforesaid Inspection Bureau, and because the inspection fees thereon had not been paid (see discussion of Florida Commercial Fertilizer Law under "II").

Similar "stop sale notices" were served upon other consignees who were shipped fertilizer under like circumstances.

The purpose of the Florida Commercial Fertilizer Law is for the protection of the people of the State of Florida and there are no provisions in the laws of the United States, or rules or regulations of the Agricultural Adjustment Administration, or any other department of the United States, which adequately protects the people of the State of Florida against the use of inferior fertilizer furnished the farmers of the State of Florida under the Soil Conservation and Domestic Allotment Act. There being no adequate inspection or analysis of fertilizers by the federal government, the use of the same on lands of the State of Florida, might result in great damage and loss to the people of the State of Florida.

IV

SPECIFICATION OF ERRORS INTENDED TO BE URGED

Appellants urge that the District Court erred in entering the decree appealed from because:

First Specification: Neither in the federal constitution nor any Act of Congress, relating to the subject matter of this suit, is there any intention indicated or shown that the federal government, through its agency, the Agricultural Adjustment Administration, in the carrying out of its functions of furnishing fertilizer to Florida farmers under the soil building and conservation program of said Agricultural Adjustment Administration, should be exempt or immunized from compliance with reasonable state regulatory measures and the payment of reasonable state inspection fees for such regulatory services, upon such fertilizer which is to be used upon Florida soil over which the state has not relinquished its sovereignty. Assignments of Error 1, 2, 4, 6, 7 and 8 (R 127, 128).

Second Specification: In the carrying out of the program specified in the preceding specification, the Agricultural Adjustment Administration may not lawfully refuse compliance with reasonable state regulations, and the payment of reasonable state inspection fees to defray the expenses thereof, enacted in the exercise of the state's inherent police power. Assignments of Error 15 (R 130).

Third Specification: In the carrying out of the soil building and conservation program disclosed by the record in this cause, and mentioned in the first specification, the Agricultural Adjustment Administration is acting merely as a service agent or conduit for the fertilizer manufacturer and/or the Florida farmer, and, viewed in such light, there is no unreasonable burden cast upon the federal government or its agency, the Agricultural Adjustment Administion, by compliance with the state regulatory law governing the importation of fertilizer into Florida for use upon Florida soil. Assignments of Error 5 and 16 (R 128, 131).

V.

SUMMARY OF ARGUMENT

First Specification: The Florida Commercial Fertilizer Law imposes a reasonable inspection fee to defray the expenses of enforcing the inspection and regulatory provisions of the Act, the purpose of which is to guarantee the proper standard of quality and purity of fertilizer consumed by the Florida farmer upon Florida soil, and to also insure proper weights and quantity to the farmer. Certainly the imposition of a reasonable inspection fee, merely for the purpose of providing inspection services, would stand in no worse category with respect to the right of immunity therefrom than would the case of a state tax exacted for the purpose of raising revenue. And in case of such a state tax, the rule has been, since the

case of GRAVES v. NEW YORK, 306 U. S. 466, 83 L. ed. 927, that immunity of the federal government from state taxation may not be upheld in the absence of an intention disclosed by Congress to provide such immunity, and that mere silence on the part of Congress is not sufficient. No Act of Congress relating to the subject matter of the furnishing of fertilizer or fertilizer materials to Florida farmers under the soil building program of the Agricultural Adjustment Administration either declares or indicates an intention to provide immunity to the government agency from complying with the Florida Inspection Law for such material, nor is there any provision in the federal constitution which indicates an intention to provide immunity.

On the contrary the federal constitution itself, in Section 10, Article I, Clause 2, expressly recognizes the inherent and reserved power and authority of the States to enact inspection laws and exact reasonable fees to defray expenses of administering such laws. This constitutional provision has been construed by this court in the PATAPSCO GUANO CO. v. BOARD OF AGRICULTURE OF NORTH CAROLINA, 171 U. S. 345, 18 S. Ct. 862, 43 L. ed. 191 case, to apply to such products imported into the state not only from a foreign country but in interstate commerce from another state. Not only is there thus a clear constitutional expression on the point, but the very Act of Congress granting the appropriation of monies out of the national treasury for the purchase of the identical fertilizers and fertilizer materials involved in the instant case carries the affirmative provision that such monies be used not only to pay the actual cost of purchasing the product but also to pay all expenses necessary in making such grants to the farmer, including all or part of the costs incident to the delivery thereof. While the words "State

Inspection Fees" are not expressly used in such appropriation act, yet the language of the proviso is such as would seem to clearly include and in fact contemplate payment of such inspection fees.

If the intention, therefore, of both Congress and the Constitution itself is to the effect that such inspection fees should be paid, there may be no possible legitimate claim to federal immunity.

The issue is not whether the state regulatory act contains any affirmative provision that it should be binding upon any federal agency, but whether there is any indication in a federal act or the federal constitution that such federal agency should be immunized from compliance with the state law. This is so because the enactment of state inspection laws is expressly declared and recognized by the constitution itself and must be presumed, absent any provision of exemption, to be all embracing and operative upon all products sold within or coming into the state.

Second Specification: The Constitution of the United States is a document of delegated powers only and all powers not expressly granted to the federal government are expressly reserved to the states themselves. As to such reserved powers, the state is as independent of the federal government as the federal government, within its delegated sphere, is independent of the state. And in the exercise of power by the state, not delegated to the federal government, such exercise is unconditionally sovereign. Each of the dual governments is supreme within its field.

The enactment of state regulatory laws, in the exercise of the reserved police power of the state, is uniformly recognized, and a regulatory program for insuring proper quality and purity, as well as proper weight and measurement, of fertilizer and fertilizer materials, is a well known

and well established exercise of such police power. Such inspection regulation carries with it the right to impose reasonable fees for the purpose of enforcement.

Such inspection laws are not, in themselves, regulations of commerce. Nor does the fact that the national government is supreme within its delegated field remove it or its agencies from compliance with such state inspection laws when there is no unreasonable burden upon the national government. The fertilizer is brought into the State of Florida to be used upon Florida soil. The state has complete sovereignty over that soil. It is not upon property owned or even leased by the national government, PENN DAIRIES, INC. and THE UNITED STATES OF AMERICA v. THE MILK CONTROL COMMISSION, THE COMMONWEALTH OF PENNSYLANIA, decided March 1, 1943, not yet reported. The state law is designed not only to protect the Florida farmer but to preserve and protect Florida soil from fertilizer and fertilizer materials of inferior quality. If there were an undue interference in the performance by the Agricultural Adjustment Administration of any function granted by Congress, there might be substance to the argument of immunity from the state law but here there is no undue interference nor unreasonable burden on the federal agency, and the exercise of the state's inherent police power should be nothing less than complete and inclusive.

Third Specification: The mechanics of the program of the Agricultural Adjustment Administration, in the procuring and furnishing to Florida farmers of fertilizer to go into Florida soil, shows that at the most the federal agency is acting merely as a service medium or conduit by which, or through which, the manufacturer sells the fertilizer and the Florida farmer buys it. Congress appropriates money with which the Agricultural Adjustment

Administration may contract to purchase fertilizer from the manufacturers, to be used in the program. The Soil Conservation and Domestic Allotment Act permits benefit payments to be made to farmers participating in the program, in return for carrying out the farming practices prescribed, and further provides that the cost of such materials furnished him, such as fertilizer, shall be deducted from such payments. Thus in the last analysis the manufacturer sells the fertilizer and the Florida farmer buys it and pays for it. The farmer reimburses the government, not only the actual purchase price of the material, but also all costs and expenses incurred in its delivery to the farmer. In procuring the fertilizer and delivering it to Florida farmers, the federal government incurs no economic burden. Nor does it incur any burden other than economic because of the state regulatory law.

The courts in ruling upon the applicability of statutes to a particular situation must, of necessity, look into the substance of the transaction, even to the extent of piercing the veil with which it is covered. The niceties of argument as to ownership of the materials from the time they leave the hands of the manufacturer to the time when they become commingled with Florida soil, may not be allowed to obscure the real character of the entire transaction. Immunity from compliance with reasonable state regulatory measures designed to protect Florida farmers and Florida soil over which the state exercises sovereignty may not be defeated upon such a narrow premise. The fertilizer goes direct by railroad transportation from the fertilizer manufacturer to the Florida consumer. The Agricultural Adjustment Administration program merely provides the mechanics for effecting the delivery. Under the federal act itself the Florida farmer may procure his own fertilizer, independent of the Agricultural Adjustment

Administration, and if he does, there is no question of the requirement of compliance with the state law. If the fertilizer goes through the Agricultural Adjustment Administration there is no distinction in the substance or in the result of the transaction.

VI.

ARGUMENT

First Specification:

NEITHER IN THE FEDERAL CONSTITUTION NOR ANY ACT OF CONGRESS, RELATING TO THE SUBJECT MATTER OF THIS SUIT, IS THERE ANY INTENTION INDICATED OR SHOWN THAT THE FEDERAL GOVERNMENT, THROUGH ITS AGENCY, THE AGRICULTURAL ADJUSTMENT ADMINISTRATION, IN THE CARRYING OUT OF ITS FUNCTIONS OF FURNISHING FERTILIZER TO FLORIDA FARMERS UNDER THE SOIL BUILDING AND CONSERVATION PROGRAM OF SAID AGRICULTURAL ADJUSTMENT ADMINISTRATION, SHOULD BE EXEMPT OR IMMUNIZED FROM COMPLIANCE WITH REASONABLE STATE REGULATORY MEASURES AND THE PAYMENT OF REASONABLE STATE INSPECTION FEES FOR SUCH REGULATORY SERVICES, UPON SUCH FERTILIZER WHICH IS TO BE USED UPON FLORIDA SOIL OVER WHICH THE STATE HAS NOT RELINQUISHED ITS SOVEREIGNTY.

Appellants' contention on this point is:

(1) There is no intention, express or implied, evidenced by Congress in any of its acts relating to the carrying out of the functions under the Agricultural Adjustment Administration program to exempt or immunize the federal

government, or its agency, the Agricultural Adjustment Administration, from compliance with reasonable state regulations covering commodities involved in the carrying out of such Agricultural Adjustment Administration program and payment of reasonable inspection fees imposed in and by said state regulations for the purpose of defraying expenses thereof, and in the absence of such affirmative intention to make such exemption the courts must presume no intention to have existed (Footnote 1); and

(2) If Congress has evidenced any intention at all in the matter of exempting or immunizing the federal government, or its agency, the Agricultural Adjustment Administration, from compliance with such reasonable state regulations, such intention is to the effect that such state regulations be complied with and the state inspection fees paid.

Whatever the law may have been prior to GRAVES v. NEW YORK, supra, the rule became settled in that case that:

> "When exemption from state taxation is claimed on the ground that the federal government is burdened by the tax and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."

It was further held in that case:

"Silence of Congress implies immunity no more

FOOTNOTE 1—The University of Chicago Law Review, at page 351, Vol. 9 thereof, in commenting on the case of ALABAMA VS. KING AND BOOZER, 314 U. S. 1, 86 L. ed. 1, 62 St. Ct. 43, said:

> "It is not impossible that the court recognizes a distinction between government and instrumentality, the former operating under a constitutional immunity, the latter being immunized only when Congress specifically grants them immunity."

The Agricultural Adjustment Administration, a government agency, was granted no immunity but rather the Act providing for making grants to farmers, discussed hereafter, seemed to contemplate payment of inspection fees.

than does the silence of the Constitution."
(text 306 U. S. 480)

Applying the foregoing rule to the case at bar it would be incumbent upon the federal government, or its agency, the Agricultural Adjustment Administration, in order to successfully resist compliance with the Florida Commercial Fertilizer Law and the payment of the inspection fee imposed thereby, to point to some affirmative provision of an Act or Acts of Congress from which an intention may be reasonably gathered that Congress meant for the Agricultural Adjustment Administration not to be bound to comply with the state laws or to pay the state fees. Mere silence would afford no basis for the contention of immunity under the case of GRAVES v. NEW YORK, supra. And when the various Acts of Congress having to do with the program of the Agricultural Adjustment Administration in furnishing fertilizer to Florida farmers in furtherance of the soil building and conservation program are examined, there can be found no expression in any word or clause of those Acts to show any intention or intimation on the part of Congress that the Agricultural Adjustment Administration should be granted immunity (Footnote No. 2).

FOOTNOTE No. 2—The doctrine of implied immunity originally announced in M'Culloch vs. The State of Maryland, et al, 4 Wh 316, 4 L. ed. 579, where it was recognized that states could not tax federal agencies, apparently was based on the "supremacy clause" (Clause 2, Article VI of the Constitution of the United States) and the ground laid down by Mr. Justice Holmes, "the power to tax is the power to destroy," has been modified by later cases. There seems to be numerous formulae to apply the doctrine of implied immunity which are discussed in Annotions on page 622 of Volume 140, A.L.R. It is necessary to consider none of them in the instant case if the theory of implied immunity is that announced in the GRAVES case, supra, to-wit:

> "The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power with the governmental activities of the other."

Therefore implied immunity from taxation under the modern theory is not based on a limitation implied from the constitution itself exempting the United States and its agencies from taxation. but such immunity arises from the restraint of the state itself to interfere with the governmental activities of the federal government. It is not contended that the Inspection Fee is a tax but when there is no restraint on the state but a positive authority set out in the constitution of the United States to fix an "inspection fee" it cannot be said that there is an implied exemption of the federal government from payment of the fee or that the fee is such as to interfere with functions of government.

On the contrary, however, appellants here assert that, if any such intention on the point has been expressed or indicated by Congress, it is to the effect that the state regulatory laws should be complied with and the state inspection fees paid. In support of this contention appellants respectfully point out to the court that the current appropriation made by Congress for the purpose of providing funds for the carrying out of the identical function involved in this suit, namely, the procuring of fertilizer by or through the Agricultural Adjustment Administration and the furnishing of such fertilizer to Florida farmers, carries the following proviso:

> "Provided further, that such amount shall be available for the purchase of seeds, fertilizers, lime, trees, or any other farming materials, or any soil terracing services, making grants thereof to agricultural producers to aid them in carrying out farming practices approved by the Secretary of Agriculture in the 1941 and 1942 programs under said Act of February 29, 1936, as amended; for the reimbursement of any federal, state, or local government agency for fertilizers, seeds, lime, trees, or other farming materials, or any soil terracing services, furnished by such agency; *and for the payment of all expenses necessary in making such grants including all or part of the costs incident to the delivery thereof.*" (Italics ours).
> Public Law 674 (77th Congress) approved July 22, 1942.

The use of the language "payment of all expenses" and the further language "costs incident to the delivery thereof" would seem to not only include, but reasonably to contemplate, the payment of reasonable state inspection fees for defraying the actual expenses of inspecting the

very materials furnished to Florida farmers through the Agricultural Adjustment Administration, the purpose of which inspection is to insure a proper quality and proper quantity of the material to the consumer. And to that extent the state law is a distinct aid to the carrying out of the identical function performed by the Agricultural Adjustment Administration.

In further support of appellants' views on this point, it is found in the federal constitution itself that Section 10, Article I especially recognizes the power of the states to make a levy for the purpose of "executing its inspection laws". (Footnote No. 3) The Federal constitution being as it is a document granting powers only and expressly reserving to the states themselves all powers not expressly delegated, and the Constitution going further and expressly declaring and recognizing as being reserved to the states the levying of fees for the execution of the states' inspection laws, Section 10, Article I, supra, would seem to be a complete answer as to the intention of the Constitution with respect not only to the validity but also to the applicability and extent of such State Inspection Laws and the power of states to levy fees to carry out such laws.

Thus we have both an intention, expressed or indicated, by the fundamental law itself and also an Act of Congress concerning the identical subject matter of this suit. So that the situation here is even stronger than was the situation in the GRAVES case, supra, where the

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FOOTNOTE No. 3—In the court below the United States contended that the second clause of Section 10, Article I applied only to articles imported from or exported to foreign countries. In the case of Patapsco Guano Co. vs. Board of Agriculture, supra, the court, in discussing whether or not the Act providing for inspection of fertilizer and fertilizer materials, and charging 25 cents a ton for inspection, was in conflict with the commerce clause of the Constitution, said:

> "Clearly this cannot be so as to foreign commerce for Clause 2 of Section 10, Article I expressly recognizes the validity of state inspection laws and allows the collection of the amounts necessary for their execution and we think the same principle must apply to interstate commerce."

power of state taxation was upheld merely upon the theory of the silence of Congress as to any intention either way.

The reference in the GRAVES case, supra, to the effect that an exemption might be claimed "on the ground that the federal government is burdened by the tax", considering "the nature and effect of the alleged burden", may be disposed of upon the following considerations:

1st—The exaction in the instant case is not a tax at all but a mere inspection fee for producing funds necessary to defray the expenses of such inspection;

2nd—The fee is required by the Florida Statute to be paid by the manufacturer or agent for commercial fertilizer;

3rd—Regardless of whether the manufacturer or the Agricultural Adjustment Administration paid the fee the Florida farmer would ultimately pay the fee himself under the facts appearing in the record, and

4th—Even if it were a burden on the federal government, such burden would have to yield to the express power reserved in the state under Section 10, Article I, supra, for the doing of the identical thing now complained of, namely, imposing fees to execute its inspection laws.

Reliance was placed by appellee's counsel in the lower court, and probably will be renewed here, upon the contention that it must affirmatively appear from the state regulatory law that there was an intention on the part of the state legislature not to exempt the federal government before there could be an attempt to coerce compliance with the state law upon the federal agency. In other words it was suggested that if the state law is silent upon the subject of whether the federal agency

is or is not bound to comply with the law, then the courts must indulge the presumption that it was never intended to be applicable to the federal agency (Footnote No. 4). Such argument, while it may have found some support in earlier cases, proceeds upon a wrong premise, in that it entirely ignores the theory upon which the respective governments exercise their respective powers. State power is expressly reserved where not delegated, while federal power may not be exercised unless delegated. And in the exercise of its reserved powers the state is supreme within its field. This view has now found express recognition by this court in the GRAVES case, supra, where the State Income Tax Law of New York made no special reference to income derived from the federal government, and it was held applicable to such income for the reason that there appeared no intention upon the part of Congress, in any of its Acts, to immunize such income derived from federal authority. Also in the case cited in Footnote No. 4, supra, no reference was made in that law to instrumentality of government yet it was construed to apply thereto. Thus the courts look to the federal laws to find a basis for the claim of immunity rather than to the state laws to find a basis of applicability to the federal agency.

Second Specification:

IN THE CARRYING OUT OF THE PROGRAM SPECIFIED IN THE PRECEDING SPECIFICATION, THE AGRICULTURAL ADJUSTMENT

FOOTNOTE No. 4—Justice Roberts dissenting in James vs. Drevo Contracting Company, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, said:

"No one denies the competence of the Congress to waive the immunity in whole or in part."

Also in Thirty-first Infantry Post Exchange vs. Posadas, 54 Philippine 866 (Writ of Certiorari denied 283 U. S. 839, 75 L. ed. 1449, 51 S. Ct. 489) the court expressed the opinion that by the Act of Congress in ratifying statute of Philippine Legislature imposing a sales tax but not expressly exempting sales to a United States Army Post Exchange, Congress had in effect, waived any immunity that such sales otherwise have had.

ADMINISTRATION MAY NOT LAWFULLY REFUSE COMPLIANCE WITH REASONABLE STATE REGULATION, AND THE PAYMENT OF REASONABLE STATE INSPECTION FEES TO DEFRAY THE EXPENSES THEREOF, ENACTED IN THE EXERCISE OF THE STATE'S INHERENT POLICE POWER.

With the exception of the powers surrendered to the federal government under the Constitution of the United States the several states are unconditionally sovereign within their respective territories (Ohio Life Insurance Etc., Company v. DeBolt, 16 How. 416, 14 L. ed. 997; Craig v. Missouri, 4 Pet. 410, 7 L. ed. 903; Skiriotes v. Florida, 313 U. S. 69, 61 S. C. R. 924, 85 L. ed. 1193). This sovereignty of the states, essential to their proper functioning under the Federal Constitution can neither be surrendered by them nor taken away by any form of legislation (Ashton v. Cameron County Water Improvement Company, 298 U. S. 513, 56 S. C. R. 892, 80 L. ed. 1309). Sovereignty to manage their own affairs reposes in the states, except only as the requirements of the Federal Constitution provide otherwise. (Madden v. Kentucky, 309 U. S. 83, 60 S. C. R. 406, 125 A. L. R. 1383, 84 L. ed. 590). The rights of the states, consistently with the Constitution and laws of the United States, to make and enforce their own laws, are equal to the right of the federal government to exert exclusive and supreme power in the field that by virtue of the United States Constitution belongs to it. (Colorado v. Symes, 286 U. S. 510, 52 S. C. R. 635, 76 L. ed. 1253). A widespread similarity of local conditions cannot confer upon Congress powers reserved to the states by the United States Constitution (United States vs. Butler, 297 U. S. 1, text 75, 56 S. C. R. 312, 102 A. L. R. 914, 80 L. ed. 477, text 493), and, not-

withstanding such similarity of local conditions, the states are supreme in respect to all powers reserved to them that are not expressly granted to the federal government (Carter v. Carter Coal Company, 298 U. S. 238, 56 S. Ct. 855, 80 L. ed. 1160).

In respect to all powers reserved to them by the Constitution the states are supreme—"as independent of the general government as that government within its sphere is independent of the states" (Collector v Day, 11 Wall. 113, 124, 20 L. ed. 122, 125). And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance of power intended by the Constitution, the powers of the general government be not so extended as to embrace powers not within the express terms of the several grants of power or the implications necessarily to be drawn therefrom (Carter v. Carter Coal Company, supra).

Inspection statutes calculated to protect the residents of a state from fraud or imposition, or to safeguard the health and safety of its inhabitants, although they may affect interstate or foreign commerce, are, if their provisions are reasonable, usually held to be valid (Palmer Brothers v. Weaver, 3 Fed. (2nd) 333, affirmed in 266 U. S. 588, 45 S. C. R. 128, 69 L. ed. 455; Gulf Fisheries Company v. Darrouzet, 17 Fed. (2nd) 374, affirmed in 276 U. S. 124, 48 S. C. R. 227, 72 L. ed. 495; Jewel Tea Company v. Troy, 80 Fed. (2nd) 366).

In the case of PURE OIL COMPANY v. MINNESOTA, 248 U. S. 158, text 161 and 162, 39 S. C. R. 35, 63 L. ed. 180, text 188 and 189, the court said:

> "The principles of law applicable to the decision of the case thus before us are few, and they are

perfectly settled by the decisions of this court. "In the exercise of its police power a state may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and welfare, or to protect the public from frauds and imposition when dealing in articles of general use, as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected. Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 357, 358, 361, 43 L. ed. 191, 195-197, 18 Supt. Ct. Rep. 862; New Mexico ex rel. McLean v. Denver & R. G. R. Co. 203 U. S. 38, 51 L. ed. 78, 27 Supt. Ct. Rep. 1; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Supt. Ct. Rep. 485, 14 Ann. Cas. 1101; Patterson v. Kentucky, 97 U. S. 501, 504, 24 L. ed. 1115, 1116; Savage v. Jones, 225 U. S. 501, 525, 56 L. ed. 1182, 1191, 32 Supt. Ct. Rep. 715."

In the case of PATAPSCO GUANO COMPANY v. BOARD OF AGRICULTURE, supra, the inspection law involved was substantially identical with the Florida Commercial Fertilizer Law where involved, which law was held valid against the contention that it violated the commerce clause of the United States Constitution. The North Carolina Statute involved in that case provided (1) an inspection fee for the "purpose of defraying the expenses connected with the inspection of fertilizers and fertilizer materials" in that state of twenty-five cents per ton, (2) required that every package of fertilizer and fertilizer material offered for sale in the state have thereon a plainly printed label or stamp showing certain things,

(3) made it a violation of the law to sell or offer for sale any fertilizer or fertilizer materials without having said label or stamp attached thereto, (4) certain inspection and analysis of the fertilizer by the state was required. The plaintiff questioned the validity of the inspection fee and the right to inspect fertilizer and fertilizer materials moving into the state in interstate and foreign commerce. In holding that inspection laws were not in themselves regulations of commerce, this court said:

> "Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within a State."

And concerning the necessity of fertilizer inspection, this court further stated:

> "It is apparent that there is no article entering into common use in many of the States, and particularly the Southern States, the inspection of which is so necessary for the protection of those citizens engaged in agricultural operations, as commercial fertilizers. Certain ingredients, as ammonia or nitrogen, phosphoric acid and potash, make up the larger part of the value of these fertilizers, and without the aid of scientific analysis, the amount of these ingredients cannot be ascertained nor whether the fertilizer sold is of a

uniform grade. The average farmer was compelled, without an analysis, to depend on his sense of smell, or his success, or failure, during the previous year with the same brand or name, to determine the relative amounts of the essential ingredients, and the value of the materials. To protect agricultural interests against spurious and low grade fertilizers was the object of this law, which simply imposed the actual cost of inspection, necessarily varying with the agricultural condition of the various years. The label or tag could only be furnished after an analysis, the result of which was therein stated. In that light, the law practically required an anlysis in every case, and was sustained as so doing by the Supreme Court of North Carolina in State v. Norris, 78 N. C. 443."

With regard to the inspection fee this court said:

"It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution; and we think the same principle must apply to interstate commerce."

Upon the general question of state regulations affecting interstate commerce, the Supreme Court in the case of CALIFORNIA v. THOMPSON, 313 U. S. 109, text 113 and 114, 61, S. C. R. 930, 85 L. ed. 1219, text 1221 and 1222, said:

"* * * Ever since Wilson v. Black Bird Creek Marsh Co. 2 Pet. (US) 245, 7 L. ed. 412, and Cooley v. Port Wardens, 12 How (US) 299, 13 L. ed. 996, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress. Because of their local character, also, there is wide scope for local regulation without impairing the uniformity of control of the national commerce in matters of national concern and without materially obstructing the free flow of commerce which were the principal objects sought to be secured by the Commerce Clause. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has, for the most part, been left to the states by the decisions of this Court, subject only to other applicable constitutional restraints. See cases collected in Di Santo v. Pennsylvania supra (273 US 40, 71 L. ed. 528, 47 S Ct. 267)."

From the foregoing it would appear that the state regulatory law here involved is valid in requiring the inspection of fertilizers sold or brought within the State of Florida unless it could be successfully asserted that the federal agency may have implied immunity upon the claim of federal supremacy. It is submitted by appellants that such claim is unsubstantial and, under the facts disclosed by this case, untenable.

In the case of CARTER v. CARTER COAL COMPANY, supra, (text 1180 L. ed.), this court upon the question

of the respective powers of the federal and state governments, said:

> "The general rule with regard to the respective powers of the national and the state governments under the Constitution, is not in doubt. The states were before the Constitution; and, consequently, their legislative powers antedated the Constitution. Those who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government; and in order that there should be no uncertainty in respect of what was taken and what was left, the national powers of legislation were not aggregated but enumerated—with the result that what was not embraced by the enumeration remained vested in the states without change or impairment. * * *."

and upon the question of the supremacy of the state government within their spheres, further said:

> *"While the states are not sovereign in the true sense of that term,* but only quasi-sovereign, yet in respect of all powers reserved to them *they are supreme—'as independent of the general government as that government within its sphere is independent of the states'.* Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 20 L. Ed. 122, 125. And since every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the

> general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom. It is no longer open to question that the general government, unlike the states, Hammer v. Dagenhart, 247 U. S. 251, 275, 62 L. ed. 1101, 1107, 38 S. Ct. 529, 3 A. L. R. 649, Ann. Cas. 1918E, 724, possesses no *inherent* power in respect of the internal affairs of the states; and emphatically not with regard to legislation. * * *." (Italics ours).

In the case of UNITED STATES v. CALIFORNIA, 297 U. S. 175, text 183 and 184, 56 S. C. R. 421, 80 L. ed. 567, text 572, this Court held that the State of California, although when "operating its railroad it is acting within a power reserved to the states", was subject to the laws regulating interstate commerce in its operation of the railroad. This seems to be a holding that the state, when acting within one of its reserved powers, may overlap one of the powers granted to the United States and thereby become subject to regulatory laws of the United States.

It having been determined that the state may in the performance of one of its powers become subject to the rules and regulations of the federal government under another power granted to it under the United States Constitution, *is not the converse also true;* may not the United States in the performance of one of its granted powers become subject to the rules and regulations of one of the states under another power reserved to the state? The state in the exercise of its powers acts as an independent sovereign as does the federal government when exercising a power granted it.

Although the State of Florida owns none of the lands upon which the fertilizer and fertilizer materials furnished by the United States and its agencies are to be used, it has an interest independent of and behind the titles and interests of its citizens in all of the earth and air within its domain, as well as the welfare of its citizens. This seems to have been the substance of the holding of this court in the case of GEORGIA v. TENNESSEE COPPER COMPANY, 206 U. S. 230, text 237, 27 S. Ct. 618, 51 L. ed. 1038, text 1044, when it said:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. *In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.* It might have to pay individuals before it could utter that word but with it remains the final power. * * *."
> (Italics ours).

and in the case of HUDSON WATER CO. v. McCARTER, 209 U. S. 349, text 355, 28, S.C.R. 529, 14 Ann. Cas. 560, 52 L. ed. 828, when it said:

> "* * * it is recognized that the State has quasi-sovereign and representative of the interests of

> the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. Kansas v. Colorado, 185 U. S. 125, 141, 142; S. C., 206 U. S. 46, 99; Georgia v. Tennessee Copper Co., 206 U. S. 230, 238. * * *."

Courts, in drawing the lines of demarcation which defines the limits of the powers and immunities between the state and federal governments, should strive to preserve to each government the freedom to carry out the duties and affairs committed to each under the Constitution of the United States without undue interference from each other. Under this rule the United States should not be permitted to unduly interfere with the states in the enforcement of the police powers reserved to them under the Constitution. In this connection see EDUCATIONAL FILMS CORPORATION v. WARD, 282 U. S. 379, text 391 and 392, 51 S.C.R. 170, 75 L. ed. 400, text 406 and 407, where this court said:

> "This court in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. *The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Con-*

> *stitution, without undue interference by the order.* M'Culloch v. Maryland, 4 Wheat. p. 405, 4 L. ed. 501; The Collector v. Day (Buffington v. Day) 11 Wall. 113, 125, 20 L. ed. 122, 126; Union P. R. Co. v. Peniston, 18 Wall. 5, 31, 21 L. ed. 787, 791; South Carolina v. United States, 199 U. S. 437, 461, 50 L. ed. 261, 269, 26 S. Ct. 110, 4 Ann. Cas. 737; Flint v. Stone."

In the instant case the federal government does not own or have exclusive jurisdiction over the lands within the State of Florida whereon the fertilizer and fertilizer materials furnished by the federal government to farmers in this state are to be used. There has been no cession of territorial jurisdiction over the farms by the state. This being true it seems that the state laws remain in full force and effect and that the state has full police power over said land and said farmers, and as an incident to the police jurisdiction has the authority to determine what fertilizer, plants, seeds and the like will be used thereon. Under that police power the state might enter such farms and regulate, even to the point of seizure and destruction, anything that may be to the best interest of the state as a whole. These powers have not been ceded by the state to the federal government and none of them were granted the United States under the United States Constitution. Nothing in the federal laws brought in question seem to supplant the state's police power as aforesaid or to supersede it.

Reasonable conclusions to be drawn from the above and foregoing authorities is that, where the United States or any of its agencies, as a part of the Soil Conservation and Domestic Allotment program, purchases fertilizers or fertilizer materials, in other states or countries, and brings the same into the State of Florida for the purpose of furnishing the same to agricultural producers for use upon

lands in the State of Florida not owned by or under the exclusive jurisdiction of the said United States or its agency, the State of Florida may:

1. As one of its police powers and for the protection of its people, cause such fertilizers and fertilizer materials to be inspected and analyzed for the purpose of ascertaining and determining whether the same meets the specifications and required analysis specified by the Florida Commercial Fertilizer Law of fertilizers and fertilizer materials to be used on, in, or mixed with, lands within said state;

2. Require, also, under its police powers for the protection of its people, the registration of the brand, guaranteed analysis and formula of fertilizers and fertilizer materials, as is required by the Florida Commercial Fertilizer Law as a condition precedent to its sale or delivery for use on, in, or mixed with, lands within said state; and,

3. Require the payment of an inspection fee, in connection therewith for the purpose of defraying the expenses of inspection, analysis, and law enforcement. This is not a tax but a fee to cover the expenses of enforcement of the inspection law.

Nothing said herein conflicts with what was stated in FEDERAL LAND BANK OF ST. PAUL v. BISMARCK LUMBER CO., 314 U. S. 95, 86 L. ed. 65, nor any of the other cases predicated upon the Birsmarck Lumber case. In the Bismarck case the federal Act establishing Federal Land Banks contained an express statutory exemption of such banks from state taxation and it was merely held that:

> "Congress may constitutionally immunize from state taxation activities in furtherance of the lend-

ing functions of land banks, since such functions are governmental rather than proprietary."

Thus the rationale of the Bismarck case is that, even in those instances where the exercise of federal power is governmental in character rather than proprietary, there should still be an affirmative congressional exemption from state taxation. At least this is the implication from the Bismarck case.

Third Specification:

IN THE CARRYING OUT OF THE SOIL BUILDING AND CONSERVATION PROGRAM DISCLOSED BY THE RECORD IN THIS CAUSE, AND MENTIONED IN THE FIRST SPECIFICATION, THE AGRICULTURAL ADJUSTMENT ADMINISTRATION IS ACTING MERELY AS A SERVICE AGENT OR CONDUIT FOR THE FERTILIZER MANUFACTURER AND/OR THE FLORIDA FARMER, AND, VIEWED IN SUCH LIGHT, THERE IS NO UNREASONABLE BURDEN CAST UPON THE FEDERAL GOVERNMENT OR ITS AGENCY, THE AGRICULTURAL ADJUSTMENT ADMINISTRATION, BY COMPLIANCE WITH THE STATE REGULATORY LAW GOVERNING THE IMPORTATION OF FERTILIZER INTO FLORIDA FOR USE UPON FLORIDA SOIL.

The record discloses that the appellee here, plaintiff in the court below, filed a motion for summary judgment, which motion, without consent of appellants here, was granted by the lower court (R 109, 116). The making and granting of such motion, and the entry of final decree granting permanent injunction thereon, automatically operated as an admission of the facts set up in the factual

defenses by the appellants in the court below. Among such facts set up as a defense are the following: that the uniform enforcement of the Florida Commercial Fertilizer Law protects all the Florida farmers alike who use commercial fertilizers, in that the farmers are insured of receiving fertilizers of an approved and guaranteed analysis of quality; that the Agricultural Adjustment Administration is obstructing and hindering proper enforcement of said State Act as to such fertilizer going through the administration and as to such Florida farmers receiving the same; that regardless of the form of the transaction whereby the fertilizer is acquired by the federal agency and delivered to the Florida farmer, such transaction is in effect and in substance a sale or transfer of the fertilizer from the fertilizer manufacturer to the Florida farmer, the federal agency merely acting as an agent or conduit through which the fertilizer passes from the manufacturer to the farmer; that all fees, costs and other expenses incurred in connection with the procuring and transferring of the fertilizer to the Florida farmer is paid by the farmer himself, and that if the manufacturer were allowed to pay the tax he would be reimbursed by the Florida farmer, either directly or through the Agricultural Adjustment Administration; that in carrying out the so-called soil building program the Agricultural Adjustment Administration is refusing to allow Florida fertilizer manufacturers to furnish fertilizer to Florida farmers but requiring Florida farmers to receive only such fertilizer as had been manufactured in other states and thence shipped into the State of Florida, the theory being that, as such fertilizer came into Florida from another state, a right of immunity could be claimed from complying with the Florida Inspection Law; that Florida manufacturers were amply able to furnish abundant fertilizer of proper quality to Florida farmers but were prevented from so doing by the policy

of the Agricultural Adjustment Administration, even though such policy required the Florida farmers to pay materially more for the fertilizer received by them from foreign states.

From the foregoing it is submitted that the mere fact that the federal agency contrives to procure fertilizer for Florida farmers from foreign manufacturers rather than to allow the Florida manufacturer to deliver it to the farmers of his own state, cannot be the difference between compliance and noncompliance with the State law. In its essence the transaction is one and the same. If the fertilizer came from Florida manufacturers the Inspection Law would attach and the inspection fee be due and payable when it was offered for sale by the Florida manufacturer, and under the case of ALABAMA v. KING & BOOZER, supra, there would seem to be no question of the validity of the levy even though the federal agency had to reimburse the Florida manufacturer out of the national treasury could not even pass it on to the Florida farmer.

What is the difference between the two situations in substance? Is there some magic in state lines that would produce such an unwarranted discrimination? The answer to the question is that in both instances the Agricultural Adjustment Administration is merely acting as a conduit or service medium in effecting the transfer of fertilizer from the manufacturer to the farmer. The federal government pays out no monies because of the State Inspection Fee. In both instances the manufacturer would pay the fee, as is required under the state law, and would then pass it on to the farmer, as is and has been the practice in all other cases. The argument that the federal government buys the fertilizer from the manufacturer in Georgia and thereby takes over an exclusive ownership thereof, and

retains such ownership until the fertilizer is delivered to the farmer in Florida, and becomes commingled with the soil, and therefore, at the time the product is introduced into the State of Florida it is the property exclusively of the federal government, is at once hyper-technical and does violence to the substance of the transaction. It is based upon an artificial factual situation.

In STANDARD OIL COMPANY OF LOUISIANA v. FORTENOT, 198 La. 644, 4 So. (2d) 634, the Supreme Court of Louisiana had somewhat the same situation before it, and in that case the Court peered through the artificial veil with which the transaction was covered and examined the substance of the entire transaction. The result arrived at by the Court, with reference to immunity from state taxation, when the substance of the transaction was considered, was quite different than if the mere outward appearance of the transaction had been alone considered.

In the instant case, if the federal agency be considered not as a bona fide owner of the fertilizer when it comes into the State of Florida, but merely as a service agent in effecting the transfer, or aiding in the transfer, of the fertilizer to the Florida farmer, it could not be seriously contended that the fertilizer was not subject to inspection under the state law nor the manufacturer thereof to the payment of the inspection fee.

It is respectfully submitted that the decree appealed from shall be reversed.

Respectfully submitted,

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Brief adopted by the undersigned as Amici Curiae:

WILLIAM N. MCQUEEN, as *Acting Attorney General* in behalf of the State of Alabama;

EUGENE STANLEY, as *Attorney General* in behalf of the State of Louisiana;

HARRY MCMULLAN, as *Attorney General* in behalf of the State of North Carolina;

THOMAS J. HERBERT, as *Attorney General* in behalf of the State of Ohio.

APPENDIX A

In the District Court of the United States for the Northern District of Florida

CIVIL ACTION GCA-31

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATHAN MAYO, et al.,
Defendant.

ORDER ON MOTIONS AND FINAL DECREE

This cause came on to be heard and was argued by counsel and on consideration thereof, the Court having filed its Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED and DECREED as follows:

1. The motion of defendants to dismiss the complaint is denied.
2. The motion of plaintiff to dismiss the counterclaim for want of jurisdiction is granted; and defendants' motion to add parties is accordingly denied.
3. The application of plaintiff for a preliminary injunction is granted.
4. The motion of plaintiff for summary judgment enjoining the defendants as prayed in the complaint and for a final permanent injunction in the terms of the temporary restraining order heretofore issued is granted.

And it is FURTHER ORDERED, ADJUDGED and DECREED as follows:

5. The defendants above named and each of them, their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them are hereby permanently enjoined from: Taking any steps to enforce "stop sale notices" issued under the Florida Commercial Fertilizer Law relating to fertilizer sought to be distributed by or on behalf of the United States or persons acting on its behalf, or to apply the provisions of the Florida Commercial Fertilizer Law to the United States, any of its property or transactions or any persons engaged in its behalf in carrying on its program for the distribution of fertilizer and from threatening to take such steps, and from cancelling the right to do business of any fertilizer company by reason of any transaction with the United States, and from interfering, impairing, of obstructing in any way the program of the United States with respect to the distribution of fertilizer.

6. The defendants are hereby required to vacate and set aside the "stop sale notices" and seizures which are the subject matter of this action.

7. The Court reserves jurisdiction of this cause and of the parties for the purpose of enforcement of this decree and for the granting of such further relief as may be appropriate.

Dated October 26, 1942.

LEON MCCORD,
United States Circuit Judge.

AUGUSTINE V. LONG,
United States District Judge.

Dissenting: CURTIS L. WALLER,
United States District Judge.

APPENDIX B

In the District Court of the United States for the Northern District of Florida

CIVIL ACTION GCA-31

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NATHAN MAYO, et al,
Defendant.

Dissenting Opinion by District Judge Waller

The Florida Fertilizer Inspection Statute is a valid exercise of the police power of the State to protect the farmers against the sale of inferior or fraudulent fertilizer.

The Federal Government has enacted no statute for the protection of the purchasers of fertilizer in Florida. Under the Constitution all power not granted to the Federal Government was reserved to the States. Moreover, the power of the State to levy a reasonable inspection fee is expressly provided in Section 10 of Article I:

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, *except what may be absolutely necessary for executing its inspection Laws:* * * *" (Italics supplied.)

The right of the State to levy an inspection tax is not merely implied but expressly conferred by the Constitution.

The Congress could not take the power away from the State to levy a reasonable inspection tax. If Congress cannot do so, it follows that the Department of Agriculture cannot do so.

The State is supreme and sovereign in the exercise of its reserved powers. The right to levy an inspection tax is expressly reserved in the State. Therefore, the State is supreme in the exercise of this power.

Congress is supreme in the powers delegated to it, but the right to regulate the inspection of fertilizer or to regulate agriculture was not expressly delegated to the Congress. Whatever power Congress has to regulate agriculture is under the general welfare clause of the Constitution, but the promotion of the general welfare does not call for the striking down of a constitutional power of a State. It is more important that the relations between the State and Federal Governments under our dual system be preserved and left uninfringed than refraining from deducting from a gift to the farmer a reasonable inspection fee levied by the State under the power of the Federal Constitution.

I agree with the majority Court that the State was probably without power to seize property of the United States, to wit, the fertilizer in question, but I consider the seizure as purely procedural. The substantive question is whether or not the Department of Agriculture has the right to procure fertilizer for farmers and thereby permit them to escape the payment of an inspection tax, whereas the vast majority of farmers who are not the recipients of this gratuity will have to pay an inspection tax. It is idle to say that this inspection fee is a burden upon the Federal Government for the reason that since it is a gratuity the Government can, without loss to itself, deduct the amount of the inspection tax from the amount of the benefit to be paid to the farmer, of which the fertilizer distribution is but an advancement.

I do not consider that the inspection fee is a tax, but if it be a tax it is a non-discriminatory tax and compels no burden to be cast upon the Federal Government.

If it be a tax there is no implication that Congress intended to grant immunity from the payment of the tax. There is no immunity from taxation granted in the Federal Constitution. Immunity proceeds only from the express language of a statute or implications therein. An implied immunity can only be ascertained from the intention of Congress, and the nature and effect of the burden placed upon the Government. See GRAVES v. NEW YORK, EX REL O'KEEFE, 306 U. S. 468; STATE OF ALABAMA v. KING & BOOZER, 314 U. S. 1; CURRY v. UNITED STATES, 314 U. S. 14.

In the case of GRAVES v. NEW YORK, EX REL O'KEEFE, supra, the Court, referring to the decision in the case of HELVERING v. GERHARDT, 304 U. S. 405, said:

> "* * * it was there pointed out that the implied immunity of one government and its agencies from taxation by the other *should*, as a principle of constitutional construction, *be narrowly restricted*. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, * * *" (Italics supplied.)

It seems to me that in view of the power of the State expressly conferred by the Federal Constitution to levy an inspection tax, it could not be implied, in the absence of express language in the statute, that Congress intended to exempt the fertilizer in question from the provisions of the valid inspection statute of the State of Florida.

Entertaining the above views I am forced to dissent from the findings of fact and conclusions of law of the majority of the Court.

October 28, 1942.

/s/ CURTIS L. WALLER,
United States District Judge.